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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

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19 Paradise, Konstantin Penanen, Celeste M.)
Satter, Peter M.B. Shames, Amy Snyder)
20 Hale, William John Walker and Paul R.)
Weissman,)

21 Plaintiffs,)
22)
23 vs.)

24 National Aeronautics and Space)
Administration, an Agency of the United)
25 States; Michael Griffin, Director of)
NASA, in his official capacity only;)
Department of Commerce; Carlos M.)
26 Gutierrez, Secretary of Commerce, in his)
official capacity only; California Institute)
27 of Technology; and Does 1-100,)
28)

Defendants.)

Case No. CV-07-05669 ODW (VBKx)

**NOTICE OF MOTION TO DISMISS
FIRST AMENDED COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**

Complaint Filed: August 30, 2007

Date: January 7, 2008

Time: 1:30 p.m.

Courtroom: 11

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 Pursuant to Fed. R. Civ. P. 12(b)(6) and the parties' Stipulation and Proposed
3 Order to Amend Complaint and Set Proposed Briefing Schedule in Response to
4 Amended Complaint, entered on October 19, 2007, Defendant California Institute of
5 Technology ("Caltech") moves to dismiss Plaintiffs' First Amended Complaint for
6 Injunctive and Declaratory Relief. This motion is made following the conference of
7 counsel pursuant to L.R. 7-3 which took place on October 17, 2007. Caltech's
8 motion to dismiss should be granted for the following reasons:

9 First, Plaintiffs' Administrative Procedure Act claim against Caltech fails
10 because Caltech is not a federal agency subject to the requirements of that act.

11 Second, Plaintiffs' U.S. Constitution claims against Caltech fail because
12 Plaintiffs do not adequately allege that Caltech is engaging in government action.
13 Moreover, Plaintiffs have made a number of judicial statements which preclude any
14 finding that Caltech is a government actor. Caltech is a private entity and cannot be
15 liable for the alleged constitutional violations, even if Plaintiffs could state a claim
16 against the federal government defendants.

17 Third, Plaintiffs' California state constitution claim against Caltech fails
18 because, as interpreted by Plaintiffs, it is preempted by federal law. Caltech cannot be
19 subject to state laws that conflict with the federal regulations Caltech is obligated to
20 follow in connection with its operation of a NASA facility.

21 Caltech's motion to dismiss is supported by the Memorandum of Points of
22 Authorities and the Request for Judicial Notice and attached exhibits, filed
23 concurrently herewith.

1 DATED: November 21, 2007

KIRKLAND & ELLIS LLP

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4 By: Mark Holscher

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1 **PROOF OF SERVICE**

2 I, Allison L. Mayo Andrews, am employed in the County of Los Angeles,
3 State of California. I am over the age of 18 and not a party to the within action;
4 my business address is Kirkland & Ellis LLP, 777 S. Figueroa Street, Los
5 Angeles, CA 90017.

6 On November 21, 2007, I served the foregoing document(s) described as:

7
8 **1. NOTICE OF MOTION TO DISMISS FIRST AMENDED
9 COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

10 on the interested parties in this action as follows:

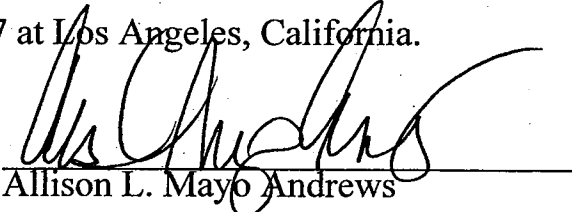
11 **SEE ATTACHED SERVICE LIST**

12 **[E-mail]** By transmitting via electronic mail the document(s) listed
13 above to the person at the electronic addresses set forth in the above-
entitled action.

14 **[Federal Express]** By placing the document(s) listed above in a sealed
15 overnight courier envelope addressed as set forth below and routing
16 the envelope for pick up within our offices by Federal Express. I am
17 familiar with the firm's practice of collection for pick up and overnight
18 delivery by Federal Express. It is routed for daily pick up in our
offices by Federal Express on that same day with overnight courier
charges thereon fully prepaid in the ordinary course of business. I am
aware that on motion of the party served, service is presumed invalid if
the delivery date is more than one day after date of deposit with
Federal Express in this affidavit.

19 **(Federal)** I declare under penalty of perjury that I am employed in the
20 office of a member of the bar of this court at whose direction the
service was made.

21 Executed on November 21, 2007 at Los Angeles, California.

22
23 
24 Allison L. Mayo Andrews

SERVICE LIST

Via Federal Express & E-mail

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